IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. LEE, *et al.*,
Petitioners,

v.

DANIEL WEISMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF CONCERNED WOMEN FOR AMERICA AND FREE SPEECH ADVOCATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

THOMAS PATRICK MONAGHAN
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

JAMES MATTHEW HENDERSON, SR.
(Counsel of Record)
1000 Thomas Jefferson Street, NW
Suite 520
Washington, DC 20007
(202) 337-2273

JORDAN LORENCE
MARK N. TROOBNICK
370 L'Enfant Promenade
Suite 800
Washington, DC 20024
(202) 488-7000

Attorneys for Amici Curiae

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QUESTION PRESENTED

Do public secondary school students possess the requisite intellectual competence and independent judgment necessary to discern the difference between *government* speech endorsing religion, which is prohibited by the Establishment Clause, and *private* speech, which is protected by the Free Speech Clause, such as that of a rabbi's invocation during commencement exercises?

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INTEREST OF AMICI *

Concerned Women for America

Concerned Women for America ("CWA") is a national, nonprofit organization representing approximately 700,000 people. The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities.

CWA files this brief in support of the Petitioner because, in the view of CWA, the current state of law re-

* The parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37.3.

specting the Establishment and Free Exercise Clauses of the federal constitution requires significant clarification. Most importantly, the consistent and devoted use of the *Lemon* test by federal trial and appeals courts must be addressed, and corrected, by the Court.

CWA supports the position that private persons may recite a nondenominational invocation during the course of public secondary school graduations and promotional exercises. CWA urges the Court to reverse the decisions of the lower courts herein.

Free Speech Advocates

Free Speech Advocates ("FSA") is a national legal defense project headquartered in New Hope, Kentucky. FSA attorneys specialize in the defense of the constitutional rights to freedom of speech, freedom of conscience, and religious liberty. The primary purpose of FSA is to defend public expressions of personal beliefs and ideals.

FSA firmly believes in the importance of recognizing constitutional protection for religious speech. To construe the Establishment Clause to require official censorship of religious ideas, or even the mere mention of God, is to pervert the first amendment into an instrument for suppressing religious thought and discussion. FSA attorneys, together with CWA attorneys, have participated in preparing and presenting a Petition for a Writ of Certiorari which raises similar issues of Establishment Clause jurisprudence. *See Roberts v. Madigan*, No. 90-1448 (Mar. 15, 1990), *cert. pending*, 59 U.S.L.W. 3654.

SUMMARY OF ARGUMENT

Never has this Court enshrined the analysis from any one of its Establishment Clause decisions as the only test useful in resolving Establishment Clause claims. The Court has not employed the test it applied in *Lemon v. Kurtzman*, 403 U.S. 602 (1989), either as the sole measure of Establishment or in a rigid or formalistic fashion.

Unfortunately, despite this Court's approach, lower federal courts have made the *Lemon* test the sole means for winnowing out governmental Establishments. One real and unfortunate result of rigid, mechanical applications of the *Lemon* test is the absurd results which often are obtained thereby. Such absurdity is not required by the text of the Establishment Clause nor was it intended by its Framers.

If the *Lemon* test has proven unworkable, the Court should forthrightly recognize this development. Other tests for Establishment exist, which tests this Court has employed previously, and which tests provide a more workable frame for analyzing Establishment Clause claims. Significant among the reductions of these other tests is the "coercion" and "direct benefits" test suggested by the dissent in *Allegheny County v. ACLU*, 492 U.S. ——, 109 S.Ct. 3086, 3134 (1989). Precedents establish that the hallmarks of a prohibited Establishment include the use of government coercion or the distribution of direct benefits to religious groups or institutions.

In the case at bar, Respondents have complained of the practice of including invocations in graduation and promotional exercises for public secondary schools. There is, however, no coercion evident in the practice complained of. Certainly no direct benefit flows to a religion or religious institution by the practice of permitting an invocation or benediction. The correctness of this view is underscored in the present case, by Respondents' admission, at trial, that attendance at such programs is voluntary, not compulsory. Further, mere exposure to a religious practice by a private individual is not coercive. And, as the Court has recently noted, secondary school students are sufficiently mature to understand the difference between government speech and private speech.

ARGUMENT

I. THE RIGID AND FORMALISTIC APPLICATION OF THIS COURT'S *LEMON* TEST IN THE LOWER COURTS HAS LED TO ABSURD RESULTS NOT REQUIRED BY THE TEXT NOR CONTEMPLATED BY THE FRAMERS OF THE FIRST AMENDMENT.

This Court has "uniformly rejected" "an absolutist approach in applying the Establishment Clause" as "simplistic." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Indeed,

> [r]ather than mechanically invalidating all government conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, *in reality*, it establishes a religion or religious faith, or tends to do so.

Id. (emphasis added).

Since *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court has grappled with various issues related to government activity within the sphere of the religious. In recent years, most decisions pertaining to alleged violations of the Establishment Clause have devolved on this Court's application of the three-part *Lemon* test set forth in *Lemon*, 403 U.S. 602. The Court, however, has not slavishly applied the *Lemon* test; rather, in one case, the Court resolved an Establishment Clause claim without any substantive discussion of the *Lemon* test or any apparent application of the test in the decision. *Marsh v. Chambers*, 463 U.S. 783 (1983); *see also Larson v. Valente*, 456 U.S. 228 (1982) (*Lemon* not useful in analyzing instances of patent discrimination against a church). Five justices of the Supreme Court have expressed their discomfort with one aspect or another of the *Lemon* test. *See Wallace v. Jaffree*, 472 U.S. 38, 67, 68-69 (1985) (O'Connor, J., concurring in

the judgment); *id.*, at 90, 90-91 (White, J., dissenting); *id.*, at 91, 110-13 (Rehnquist, J., dissenting); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. ——, 109 S.Ct. at 3134 (Kennedy, J., together with Rehnquist, C.J., White, J., and Scalia, J., concurring in judgment in part and dissenting in part); *Lynch*, 465 U.S. at 688-89 (1984) (O'Connor, J., concurring). And the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679.

Despite the protestations noted above, courts bound to respect and comply with this Court's precedents have adopted and applied enthusiastically the *Lemon* test as the sole and controlling criterion for Establishment Clause jurisprudence. For example, in *Sands v. Morongo Unified School District*, No. S012721, slip op. at 9-10 (Cal. May 6, 1991), the plurality enshrined "the *Lemon* test [] as [the] controlling law for twenty years." *But cf. id.* at 34 (Lucas, C.J., concurring) (expressing view that, absent compulsory application of the *Lemon* test, the challenged practice would not be found to violate the Establishment Clause); *id.* at 1, 8 (Arabian, J., concurring) (current construction of Establishment Clause compels prohibition of invocations at public high school graduations; "while I concur in the judgment, I do so reluctantly, with the hope and expectation that the high court will soon endorse another view").

The results in a number of the cases reflect a cloudy confusion that plagues courts which reflexively apply the *Lemon* test in every sort of Establishment Clause case. While some of these decisions approach the level of the amusing, they all bear the scent of that "relentless extirpation of all contact between government and religion," which does not accurately or adequately reflect "the history or the purpose of the Establishment Clause." 492 U.S. at ——, 109 S.Ct. at 3135 (Kennedy, J., dissenting).

In *Roberts v. Madigan*, 702 F. Supp. 1505 (D. Colo. 1989), *aff'd*, 921 F.2d 1047 (10th Cir. 1990), *cert. pending*, 59 U.S.L.W. 3654 (No. 90-1448 Mar. 15, 1991), the principal of a suburban Denver elementary school undertook a complete purge of materials with a biblical content or nexus from her school. The principal: 1) censored Christian books from the school libraries; 2) removed a Bible from the school library reference shelf; 3) ordered a 5th grade teacher to remove two books, with biblical content, from a classroom library of over 240 books; 4) ordered that same teacher to stop reading from a Bible during a silent reading period during which students also read silently from books brought from home, the school library or chosen from the classroom library.

The classroom library, from which the biblical books were removed, contained books on ancient Greek religion and American Indian religions. The principal did not object to the minority religion materials. The teacher had silently read in front of the students books on Buddhism and Native American religions. The principal did not require the teacher to discontinue teaching about Buddhism or Native American religions.

Applying *Lemon*, the district court ordered the school district to return the Bible to the school library. In the court's view, the values embodied in *Lemon*'s analysis mandated removal of the two books from the classroom library and the prohibition on the teacher's occasional silent Bible reading. The Tenth Circuit affirmed the result and the *Lemon* analysis, by a 2-1 vote. 921 F.2d 1047.

In *Wiley v. Franklin*, 497 F. Supp. 390 (E.D.Tenn. 1980), local residents challenged Bible courses being taught in two Tennessee public school districts. In resolving the claims against the challenged practices, the district court applied the *Lemon* test, reviewing in detail each of the Bible lessons. The district court considered *Lemon* to require this examination to determine whether

the lessons objectively presented literature or history, or improperly promoted sectarian doctrine.

Of course, this Court has held that schools may teach about the Bible without inculcating religion. Indeed, "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion or the like." *Stone v. Graham*, 449 U.S. 39, 42 (1980). Rightly, this Court has declared, "the Bible is worthy of study for its literary and historic qualities. Nothing . . . indicates that such study of the Bible or religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).

In *Wiley*, the court approved Bible stories about Joshua conquering Jericho (including the Negro Spiritual "Joshua Fit (sic) the Battle of Jericho"), King Saul and David, and a parable told by Jesus of the talents. 497 F. Supp. at 394. Too sectarian, however, were the Bible stories concerning Daniel in Babylon, Moses' instructions from God about the building of the Tablernacle, and the destruction of Sodom and Gomorrah. 497 F. Supp. at 395-96. The judge based his decision on the *Lemon* test. 497 F. Supp. at 394. If *Lemon* requires federal judges to take on the mantle of Sunday School Superintendents, reviewing and approving the lesson plans used in teaching about the Bible or religion, then the entanglement prong of the test is most certainly a self-fulfilling prophecy of prohibited Establishment.

In *Stark v. St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986), the eighth circuit, in a mechanical application of the *Lemon* test, declared unconstitutional a student teacher plan used by a Minnesota state university. St. Cloud State required education majors to "student teach" for one quarter in an elementary or secondary school. Under the plan, college students were permitted, at their option, to fulfill their student teaching

obligation at participating public, private and parochial schools. The state university paid $96 per quarter to a school which accepted a student teacher. Out of all of the education majors at St. Cloud State, only three students opted to teach at parochial schools. None of the students were required to participate in the religious life of the schools they chose. One student teacher taught social studies, one taught English and the third taught kindergarten. *Id.* at 1048. The eighth circuit, by a 2-1 vote, said the arrangement violated the primary effect prong of the *Lemon* test. 802 F.2d at 1048-52.

As Judge Easterbrook noted recently, "*Lemon* has lost its tang[.]" *Harris v. City of Zion*, 927 F.2d 1401, 1419, 1424 (7th Cir. 1991) (Easterbrook, J., dissenting). Whether through inherent defect, mechanistic overuse, or a wringing approach that evinces the desire to obtain caustically antireligious results, the mere use of the *Lemon* test now signals an intent to overturn challenged government practices and policies. *See, e.g., Sands*, slip op. at 5-6 (Panelli, J., dissenting) ("Unfortunately, it appears that cases such as this are decided not by applying a test but by choosing which test to apply"). This case presents the Court with the prospect not merely of adjusting the error of the lower courts in the instant case. This case affords the Court an opportunity to check and clarify the general confusion of the judiciary which attends the litigation of Establishment Clause claims.

II. THIS COURT'S ESTABLISHMENT CLAUSE DECISIONS PROVIDE ANOTHER, MORE WORKABLE FRAMEWORK FOR ANALYZING ESTABLISHMENT CLAUSE CLAIMS. THE COURT SHOULD EMPLOY THE COERCION TEST AND DIRECT BENEFITS TEST SUGGESTED BY THE DISSENT IN *ALLEGHENY COUNTY*.

In *Allegheny County*, 492 U.S. at ——, 109 S.Ct. at 3136, Justice Kennedy suggested another Establishment Clause test, gleaned from Supreme Court precedents, to replace the *Lemon* test. Under Justice Kennedy's suggested formulation, a challenged governmental practice does not violate the Establishment Clause if it conforms with the following criteria:

> [A G]overnment may not coerce anyone to support or participate in any religion or its exercise; and, it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact estabilshes a state religion or religious faith, or tends to do so.[1]

109 S.Ct. at 3136 (citation and internal quotation marks omitted).

A. The Court's Precedents Establish That The Principal Means Of Identifying Violations Of The Establishment Clause Are Either The Use Of Government Coercion Or The Distribution Of Direct Benefits.

The coercion prong of Justice Kennedy's formulation bars use of governmental compulsion or force to cause people to adopt religious beliefs or participate in religious rituals. The coercion prong is not a creature of Justice Kennedy's making; it is derived squarely from this Court's precedent, as Justice Kennedy noted in his dissent. 492 U.S. at ——, 109 S.Ct. 3136-38. Indeed, as this Court firmly stated:

> [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943). It is long since beyond dispute that the Establishment Clause:

> forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Free-

[1] *See also Westside Community Schools v. Mergens*, 495 U.S. ——, 110 S.Ct. 2356, 2376 (1990) (Kennedy, J., and Scalia, J., concurring in part and concurring in the judgment).

> dom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

Of course, coercion of religious conduct or belief may provide an example of a direct benefit to religion, as Justice Kennedy noted:

> Barring all attempts to aid religion through government coercion goes far toward attainment [of the Religion Clauses]. . . . James Madison, who proposed the First Amendment in Congress, apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.

492 U.S. at ——, 109 S.Ct. at 3136-37 (citations and internal quotation marks omitted).

The principal reason that a coercion standard more adequately reflects the aims and requirements of the Establishment Clause than does the *Lemon* test is that, "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Allegheny*, *id.* at ——, 109 S.Ct. at 3137. And "[t]he freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and Free Exercise Clauses." *Id.* at ——, 109 S.Ct. at 3136.

Justice Kennedy's "direct benefits" standard reflects this Court's evolving views regarding financial aid to religious individuals and groups. *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Bowen v. Kendrick*, 487 U.S. 589 (1988). In its essence, the "direct benefits" prong finds no violation of the Establishment Clause when government aid inures to the benefit of religious

groups in either of two circumstances: 1) the government benefit flows to individuals or secular recipients, who make a free choice to pass the benefit through to a religious institution; or, 2) the funding comes from a governmental program with a secular governmental purpose, and the religious groups which enjoy the benefit are not the sole recipients of governmental money.

In *Mueller*, the Court upheld a state income tax deduction for tuition and certain other school-related expenses even though the deductible amounts may have been paid by the taxpayer to a religious school. Minnesota granted a deduction for expenses incurred by parents from sending their children to any school, public, private or parochial. *Id.* The tax deduction was not limited to those parents whose children attended private or parochial schools. 463 U.S. at 398. That any benefit at all "flow[ed] to parochial schools," the Court noted, resulted from "the private choices of individual parents" making education decisions. *Mueller*, 463 U.S. at 400. Certainly, in such cases, there is no direct benefit flowing to religious schools from the government:

> Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally.

463 U.S. at 399 (citation and internal quotation marks omitted).

The *Mueller* Court noted the important principle of equal access in affirming the tax plan:

> Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools, and those whose children attend nonsectarian private schools or sectarian private schools. Just as in *Widmar v. Vincent*, 454 U.S. 263 (1981), where we concluded

> that the State's provision of a forum neutrally available to a broad class of non-religious as well as religious speakers does not confer any imprimatur of state approval, ibid, so here: [t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect. Ibid.

463 U.S. at 397 (internal quotation marks omitted).

In *Witters*, this Court agreed that government money may be paid to individuals or secular recipients who then choose to donate it to a religious group. This Court said:

> It is well-settled that the Establishment Clause is not violated every time money previously in the possession of the State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constituional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.

474 U.S. at 486-87.

The *Witters* Court applied this principle to facts beyond the government payroll scenario. Larry Witters qualified for a state program funding the college education of blind people. Witters was not a government employee; he was a benefit recipient. The Court found that the Establishment Clause did not bar the state from extending benefits to Witters under an existing program for the blind. The lower courts incorrectly had held that Witters' contemplated use of the money he received to obtain a Bible college education violated the second prong of the *Lemon* test. 474 U.S. at 482.

The holdings in *Mueller* and *Witters* seemed to suggest that when governments set up programs with secular governmental purposes, and neutrally disburse funds allocated for such programs to a variety of groups, such programs pass muster under the Establishment Clause, even though religious groups are among the recipients of

program funds. This Court recently confirmed the *Mueller-Witters* suggestion in *Kendrick*, 487 U.S. 589. The *Kendrick* Court said:

> We note in addition that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.

487 U.S. at 609.

Witters presaged this principle. There the Court found that the challenged program had a secular purpose: aiding blind people in their educational pursuits. 474 U.S. at 485. Further, religious colleges were a small fraction of the indirect recipients of the program. 474 U.S. at 488.

Thus the "direct benefits" prong of Justice Kennedy's proposed test reflects the significant developments made by this Court in its Establishment Clause analysis of financial aid to religious instituituons in *Mueller*, *Witters*, and *Kendrick*.

B. There Is Neither Coercion Nor Any Direct Benefit To Religion In The Practice Of Permitting An Invocation Or Benediction During A High School Graduation Ceremony Or A Junior High School Promotional Exercise, Particularly When Attendance At Such Exercises Is Admittedly Voluntary.

As an initial consideration, graduation exercises of the sort at issue here are not important state benefits granted to students or parents. In *Smith v. Board of Education*, 844 F.2d 90, 94 (2nd Cir. 1988), the second circuit noted that, as here, "attending the graduation exercise is not a prerequisite to a student receiving his diploma[.]" Consequently the court did

> not agree with the district court that attending the graduation ceremony by itself is such an important benefit that deprivation of that benefit is an unconstitutional infringement on [a student's] beliefs.

> The [graduation] exercises are merely a social occasion at which students and their families gather to mark an event.

Id. at 94. Thus the court considered that graduation "exercises are not an important benefit conferred by the state and, as a result, [found] that [a student's] interest in attending them is not protected by the [F]ree [E]xercise [C]lause." *Id.*[2]

In Rhode Island, "every child who has completed . . . six (6) years of life . . . and has not completed sixteen (16) years of life shall regularly attend some public day school during all the days and hours that the public schools are in session. . . ." R.I. GEN. LAWS § 16-19-1. Rhode Island's compulsory school attendance law is in stark contrast to the free and voluntary decision of Respondents to attend graduation and promotional ceremonies. Respondents concede that their participation in, or presence at, public school graduations or promotional ceremonies is voluntary. *See* Agreed Statement of Facts ¶ 41 (reproduced in the Appendix To Brief in Opposition to Petition for Writ of Certiorari at A9).

The second question raised by the Petition for a Writ of Certiorari is: "Whether direct or indirect government coercion is a necessary element of an Establishment Clause violation?" Pet. at i. Including proof of direct or indirect government coercion, as an element of the test to determine Establishment Clause violations, will not drag the judiciary further into the morass that has attended the use of the *Lemon* test since its adoption. In the present dispute, the parties agreed at trial and the fact remains indisputable that Respondents chose, in the free exercise of their right to choose, to attend the promotional ceremony at Bishop Middle School. Appendix

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[2] *Cf. Swany v. San Ramon Valley Unified School District*, 720 F. Supp. 764 (N.D.Cal. 1989) (no property interest in attending high school graduation exercise such as might compel school district to provide some aspect of procedural due process).

To Brief in Opposition to Petition for Writ of Certiorari at A9 (attendance at graduations and promotional ceremonies is voluntary).

Nor does mere exposure to an invocation, on these facts, result in coercion indicative of an establishment of religion. This Court has suggested as much in its recognition that merely exposing students to the Bible or religion does not violate the Establishment Clause. *See, e.g., Schempp*, 374 U.S. at 225 ("Nothing . . . indicates that such study of the Bible or religion, when presented objectively as part of a secular program of education may not be effected consistently with the First Amendment"); *but see Roberts, supra* (requiring expurgation of two biblically oriented children's books from a classroom library of over 240 books and banning teacher's Bible from sight of students in classroom).

C. As The Court Has Previously Noted, Secondary School Students Are Sufficiently Mature To Understand The Difference Between Government Speech And Private Speech.

In *Mergens*, this Court postulated "that secondary school students are mature enough and are likely to understand" the "crucial difference between *government* speech endorsing religion . . . and *private* speech endorsing religion. . . ." 495 U.S. at —, 110 S. Ct. at 2372. In both the Court's view, *Mergens, supra*, and as determined by Congress, Equal Access Act (Title 20 U.S.C. §§ 4071 *et seq.*), students in the age groups at issue in commencement prayer cases (ages 17 and older) and in promotional exercises (ages 11 and older) are mentally equipped to discern that not all speech which occurs in school settings is endorsed by school authorities.

As noted in *Mergens*, psychological research strongly suggests that, with respect to basic cognitive maturity, adolescents (including secondary school students) are more like college students and adults than like younger children. Research on intellectual development comprises

thousands of published studies involving hundreds of thousands of individuals ranging in age from birth through adulthood. Such individuals have been assessed in a wide variety of ways with respect to their understanding of various abstract concepts and their ability to engage in a variety of forms of deductive, inductive, and moral reasoning.[3] Beginning around age 10 to 12, on the other hand, mature reasoning is often found and differences from adult reasoning can usually be eliminated with brief instruction or feedback.[4] Children aged 9 or 10 commonly fail to grasp concepts that are spontaneously understood or easily learned by college students. The younger children show systematic and persistent errors in reasoning that are rare or easily correctable in adults.

Adolescent reasoning is far from perfect, of course, but so is that of adults.[5] To the extent that adolescents deviate from standards of rationality, their deviations are of the same sort commonly found in adults. Differ-

[3] *See* M.D.S. BRAINE & B. RUMAINE, *Logical Reasoning*, 3 HANDBOOK OF CHILD PSYCHOLOGY 263 (P. Mussen ed. 1983); D. MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT 62-91 (1989); D. MOSHMAN, *The Development of Metalogical Understanding*, REASONING NECESSITY, AND LOGIC (W. Overton, ed. in press); D. MOSHMAN & L.E. LUKIN, *The Creative Construction of Rationality*, HANDBOOK OF CREATIVITY 183 (J. Glover, R. Ronning, C. Reynolds, eds. 1989); D.P. O'BRIEN, *The Development of Conditional Reasoning*, 20 ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR 61 (H. Reese, ed. 1987).

[4] *See, e.g.*, D. MOSHMAN, *Development of Formal Hypothesis-Testing Ability*, 15 DEVELOPMENTAL PSYCHOLOGY 104 (1979); D. MOSHMAN & B.A. FRANKS, *Development of the Concept of Inferential Validity*, 57 CHILD DEVELOPMENT 153 (1986); W. OVERTON, S. WARD, S. NOVECK, J. BLACK & D. O'BRIEN, *Form and Content in the Development of Deductive Reasoning*, 23 DEVELOPMENTAL PSYCHOLOGY 22 (1987).

[5] J. EVANS, THE PSYCHOLOGY OF DEDUCTIVE REASONING (1982); J. EVANS, THINKING AND REASONING: PSYCHOLOGICAL APPROACHES (1983).

ences between the average adolescent and the average adult are relatively small compared to the variability within each group. The sort of clear, qualitative differences from adult reasoning that might justify a sharp legal distinction are simply not found beyond the age of about 10 or 11.[6]

Theories of cognitive development are generally consistent with this picture. The evidence that a level of cognition comparable to that of adults is typically reached about age 11 or 12 is consistent with the classic research of Jean Piaget, the child psychologist whose theory postulate that the stage of formal operations, the culmination of cognitive development, is achieved at this age.[7] Although some aspects of Piaget's theory have been questioned, the idea that the transition to a level of abstraction typical of adult reasoning occurs no later than age 11 or 12 has been maintained in the major current theories.[8]

1. ***Analysis of the intellectual demands required to understand that a prayer at a graduation exercise is not "government endorsed" provides no basis for reconsidering the general conclusion of adolescent intellectual competence.***

The key empirical issue in the present case is the ability of secondary school students to understand the distinction between (1) a school *allowing* an invocation at

[6] D. MOSHMAN, CHILDREN, EDUCATION AND THE FIRST AMENDMENT 78; D. MOSHMAN, *Equal Access for Religion in the Public Schools? An Empirical Approach to a Legal Dilemma*, 9 DEVELOPMENTAL REVIEW (in press).

[7] B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING (1958); *see also* J. BYRNES, *Formal Operations*, 8 DEVELOPMENTAL REVIEW 66 (1988).

[8] R. CAMPBELL & M. BICKHARD, KNOWING LEVELS AND DEVELOPMENTAL STAGES (1986); R. CASE, INTELLECTUAL DEVELOPMENT (1985); K. FISCHER, *A Theory of Cognitive Development*, 87 PSYCHOLOGICAL REVIEW 477 (1980).

an annual graduation ceremony, and (2) the school *endorsing* the invocation it allows. The specific legal concept implicated here is the First Amendment principle that government must permit freedoms of belief, expression, and association,[9] and may not restrict such activity on the basis of the content of those beliefs, the content of what is expressed, or the types of people with whom one wishes to associate.[10]

There appears to be no research examining specifically the development of adolescent understanding of First Amendment principles.[11] There have been, however, many studies on the development of understanding of similarly abstract concepts. Most relevant is research on the ability consciously and systematically to distinguish form from content. In a representative recent study, students in fourth grade, seventh grade and college were asked to sort and rank a variety of logical arguments.[12] The arguments varied in both form and content. The key issue was the students' ability to understand the concept of validity (whether a conclusion followed from its premises). Most college students spontaneously understood the concept of validity. *Many seventh graders (age 12-13) showed spontaneous understanding as well.*[13] Fourth graders (ages 9-10), on the other hand, never showed spontaneous understanding of validity and rarely profited from additional guidance provided in follow-up studies.

[9] U.S. CONST. amend. I. "While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958).

[10] *See Healy v. James*, 408 U.S. 169, 180 (1972); *Cantwell*, 310 U.S. 296.

[11] One recent survey did examine student perceptions of their high school's existing policies with respect to nonreligious student groups and asked the students to speculate about school attitude toward hypothetical student religious groups. The authors classified 66% of the students as having "perceived absolute neutrality" with respect to religion and only 2% as having "perceived no neutrality". L.F. ROSSOW & N.D. ROSSOW, *High School Prayer Clubs: Can Students Perceive Religious Neutrality?*, 45 EDUCATION LAW REPORTER 475 (1988).

[12] D. MOSHMAN & B. FRANKS, *supra* at note 4.

In sum, a case can be made that children up to about age 10 are qualitatively different from adults in that they are incapable of fully comprehending a variety of abstract concepts. Adolescents, on the other hand, are likely, spontaneously, to use adult concepts. Even if the adult concept is novel to the adolescent, he can usually grasp and apply the concept after a brief explanation.[14] Available evidence does not support a sharp legal distinction between secondary school students and college students.

2. *There is little support for the view that adolescent intellectual competence is seriously undermined by extreme emotionality or susceptibility to social influence.*

Popular myths hold that adolescence is a period of extraordinary emotional turbulence and instability, that adolescents unthinkingly accede to peer pressure on all matters. Psychological research largely has undermined these myths. Adolescents do face difficult developmental challenges, but so do children and adults. Adolescents often do rebel against perceived unreasonable constraints, but so do children and adults. There is general agreement among psychologists that adolescence does not routinely involve a unique level of stress and turmoil.

Similarly, there is little support for the view that adolescents are at the mercy of their peers or incapable of

[13] With brief instruction regarding the concept of validity provided in follow-up studies, seventh grade performance was statistically indistinguishable from that of college students. *Id.*

[14] *Id.*

autonomous decision-making.[15] It is true that, compared to younger children, adolescents are less dependent on adults and more oriented toward their peers. But adults value and attend to their peers as well. Susceptibility to social influence is a general characteristic of human beings, not a unique trait of adolescents. There is little basis for the view that high school students are sharply distinct from college students or adults in their susceptibility to peer pressure or are impressionable to a degree that undermines earlier religious inculcation by parents or that threatens autonomous decisionmaking in the area of religious beliefs and values.[16]

3. *Secondary school students can exercise independent judgment.*

The ability of high school students to exercise independent judgment has been frequently noted by the courts. In *Mergens*, 495 U.S. —, 110 S.Ct. 2356, this Court recognized

> that secondary school students are mature enough and likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated.

(Citations omitted). It is worth noting that Westside High School included grades 9-12.

High school students are capable of hearing various forms of expression without attaching a school endorse-

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[15] C. IRWIN, ADOLESCENT SOCIAL BEHAVIOR AND HEALTH (1987); J. SANBROCK, ADOLESCENCE (3rd ed. 1987); L. STEINBERG, ADOLESCENCE (1985).

[16] J.P. HILL & G.N. HOLMBECK, *Attachment and Autonomy during Adolescence*, 3 ANNALS OF CHILD DEVELOPMENT 145 (G. Whitehurst ed. 1986); C. LEWIS, *Minors' Competence to Consent to Abortion*, 42 AM. PSYCHOLOGIST 84 (1987); A. WATERMAN, IDENTITY IN ADOLESCENCE (1985).

ment of the form of expression.[17] *See generally, Tinker v. Des Moines Independent School District*, 393 U.S. 503, 511 (1969) (students are not "closed circuit recipients of only that which the State chooses to communicate"). This Court has held that students are capable of understanding that the study of the Bible as history or literature in public school courses does not lead to an inference of state endorsement of religious teachings. *Schempp*, 374 U.S. at 225. In *Zorach v. Clauson*, 343 U.S. 306, 311 (1952), this Court held that released time programs for religious instruction during the school day did not carry the imprimatur of state approval of religion.

Since students are capable of understanding that allowing forms of political or religious protest does not connote state involvement or approval, *Tinker*, that placement of explicit and controversial materials in a school library does not indicate state approval or agreement with those materials, *Board of Education v. Pico*, 457 U.S. 853 (1982), and that the state's permission for students to leave school grounds for religious instruction does not indicate state support of that particular religion, *Zorach*, then high school students should be credited with the ability to understand that by allowing a "religiously-oriented" invocation at a yearly graduation, the state does not endorse that religious message.

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[17] *Seyfried v. Walton*, 668 F.2d 214, 219-20 (3rd Cir. 1981) (Rosenn, J., concurring); *see also Russo v. Central School District No. 1*, 469 F.2d 623, 633 (2nd Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (teacher's refusal to lead flag salute would not have a destructive effect on students); *James v. Board of Education*, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972); *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 504 (2nd Cir. 1975) (striking down restriction on information about contraception and abortion published in school newspapers); *Wilson v. Chancellor*, 418 F. Supp. 1358 (D.Ore. 1976) (school ban on political speakers during high school classes struck down). *See also* S.REP.NO. 357, 98TH CONG., 2D SESS. 35 (1984).

Students of high school are are currently bestowed with many rights of an adult nature. This Court has repeatedly recognized that high school students are confronted with many adult situations and are entitled to exercise their independent judgment concerning those situations. In certain circumstances, a mature minor may currently decide to have an abortion without parental notification. See *Ohio v. Akron Reproductive Health Center*, 497 U.S. ——, 111 L.Ed.2d 405 (1990). Statutory prohibitions against the sale of contraceptives to minors have been held unconstitutional, thus allowing high school students to make decisions concerning birth control. *Carey v. Population Services International*, 431 U.S. 678 (1977).

If students of high school age are capable of, and entitled to, making such healthcare decisions, certainly they are capable of distinguishing state neutrality from state support of an invocation at a graduation exercise. It would be a constitutional perversity to suggest that minors may demonstrate sufficient judgmental maturity to subvert parental or state interests arising in the abortion context, for example, but then to say with the same breath that a minor lacks the judgmental maturity to discern differences between *government* speech and *private* speech of the sort complained of by Respondents.

Consistently the courts have held that secondary school students are remarkably insightful and are able to hear varied sources of information without perceiving those views as having their school's endorsement. The courts have noted with regularity the "surprisingly sophisticated, intelligent, and discerning" nature of high school students. *Wilson*, 418 F. Supp. at 1368.[18]

[18] In upholding a guest speaker's right to address the issue of communism, the *Wilson* court noted that high school students were not susceptible to adopting the speaker's views as those of the school. *See also Seyfried*, 668 F.2d at 219 (Rosenn, J., concurring) ("the Court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the later grades of secondary school"); *Koppell v. Levine*, 347 F. Supp. 456, 464 (E.D.N.Y. 1972) (recent "legislation, judicial decisions and evolving social attitudes" have altered traditional views of students' rights). *See also Mergens v. Board of Education of Westside Community Schools*, 867 F.2d 1076, 1080 (8th Cir. 1989). The argument that less mature high school students are likely to confuse equal access policy with state sponsorship of religion was explicitly rejected by the Senatorial Committee on the Judiciary in its report of the Equal Access Act:

> Authors writing in the leading legal periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism.

S.REP.NO. 357, 98TH CONG., 2D SESS. 8 (1984).

CONCLUSION

For all the foregoing reasons, the Court should reverse the decisions of the lower courts in this case, adopting the "coercion" and "direct benefits" analysis employed by Justice Kennedy in his dissenting opinion in *Allegheny County*.

Respectfully submitted,

THOMAS PATRICK MONAGHAN
6375 New Hope Road
New Hope, KY 40052
(502) 549-5454

JAMES MATTHEW HENDERSON, SR.
(Counsel of Record)
1000 Thomas Jefferson Street, NW
Suite 520
Washington, DC 20007
(202) 337-2273

JORDAN LORENCE
MARK N. TROOBNICK
370 L'Enfant Promenade
Suite 800
Washington, DC 20024
(202) 488-7000

Attorneys for Amici Curiae

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